

**Brought forward business losses can be set off against the income chargeable as Royalty/Fees for Technical Services (FTS) if the same is earned in the normal course of business**

**Channel V Music Networks Ltd [[TS-768-ITAT-2022(Mum)] (Mumbai Tribunal) (in favor of assessee)**

### **Facts**

The assessee was a company incorporated in and tax resident of Hong Kong. It was engaged in the business of operation of satellite television channels featuring various genres of programming, data and content. The assessee mainly derived income from selling advertising airtime on the channel, distribution of the channel, syndication of content and other allied activities. The assessee received franchise fees from an Indian company. The said income was set off by the assessee against the brought forward business losses.

The Assessing Officer (AO) disallowed the set-off of brought forward business loss on the ground that

the franchise fees was in the nature of royalty and therefore, cannot be set off against the brought forward business losses. The only issue raised by the AO was that franchise fee was taxable at concessional rate of tax, whereas business income is taxable at normal rate of tax.

### **Held**

Section 72(1) of the Act permits set off of brought forward business losses against the profits and gains of any business or profession of current year, carried on by the assessee. All that is necessary for the income that can be set off against brought forward losses is that profits and gains should arise from any business or profession carried by the assessee.

The franchise fee earned by the assessee was in the course of its business. Once the income has arisen in the course of business, the rate of taxation of franchise fee is not a relevant factor to decide eligibility of set off of brought forward losses. All that matters was the nature of income which should be in the nature of profits and gains. Accordingly, the assessee was eligible to set off brought forward business losses against the franchise fees.

## CNK Comments

It was always presumed that taxation of income under section 115A of the Act is a special provision and independent of normal computation of income. Accordingly, income falling under section 115A was never considered as eligible for set off against brought forward business losses. The above decision indicates that even though income under section 115A in the nature of Royalty/FTS is taxable on gross basis as per special rates prescribed therein, the character of income would still be business income and thereby eligible for set off against brought forward business losses.

**Foreign tax credit (FTC) to be allowed even where Form 67 is filed beyond prescribed time limit**

**Sonakshi Sinha (142 taxmann.com 414) (Mumbai Trib.)] (In favour of assessee)**

### Facts

The assessee is a film actor and provides services for promotion & marketing of brands of goods, services and events. The assessee filed her return of income, wherein she had claimed FTC. The tax return was filed by her on 22 September 2018, which was within time limit allowed as per section 139(1) of the Act. However, Form 67 was filed on 20 January 2020, much after the time period allowed as per Rule 128(9) of the Rules which requires the filing of Form 67 within the due date of return filing as specified in section 139(1).

The AO rejected assessee's claim for FTC on the ground that the assessee has failed to file Form 67 within the time period allowed as per Rule 128(9) and has therefore contravened Rule 128(9) read with section 139(1).

The issue before the Tribunal was whether the assessee would be entitled to FTC even where she has not filed Form 67 before the prescribed time limit as per Rule 128(9), but before the completion of assessment proceeding.

### Held

Where there are no negative or adverse consequences that are contemplated for non-adherence to particular provision of the Act / Rules, the said provision is normally not considered to be

mandatory in nature. The same is considered as directory in nature and adherence of the same before the completion of assessment is considered as valid compliance. Rule 128(9) of the Rules does not provide for disallowance of FTC in case of delay in filing of Form 67. Section 90 or 91 of the Act also does not prescribe timeline for filing of such declaration, on or before due date of filing of return of income.

The assessee was eligible for FTC, as she had filed Form 67 before the completion of assessment proceeding.

## CNK Comments

FTC is allowed to the assessee as per the Tax Treaty entered into by India with the government of third country. The Tax Treaty provision would always override the provisions of the Act. The Supreme Court in the case of UoI vs. Azadi Bachao Andolan (132 Taxman 373) has held that the Tax Treaty, even if inconsistent, will prevail over the Act. The Tax Treaty being a sovereign matter, the machinery provisions of the Act cannot override or control treaty provisions. The Mumbai Tribunal has accordingly affirmed the position that where section 90 read with the Tax Treaty do not prescribe timeline for filing of Form 67, on or before due date of filing of return of income, the FTC cannot be disallowed by invoking provision of the Act or Rules.

The Mumbai Tribunal also took note of the subsequent amendment made by the CBDT, vide Notification No. 100 of 2022 dated 17 August 2022. As per the said Notification, Rule 128(9) has been amended, whereby Form 67 can be filed till the end of the AY in which the foreign sourced income is offered to tax or is assessed to tax in India, where the return for such AY has been furnished within the time-limit specified under Section 139(1), 139(4) i.e., belated return. The Mumbai Tribunal had chosen to apply that amendment from retrospective effect as amendment was curative in nature.



## Disclaimer and Statutory Notice

This e-publication is published by C N K & Associates, LLP Chartered Accountants, India, solely for the purposes of providing necessary information to employees, clients and other business associates. This publication summarizes the important statutory and regulatory developments. Whilst every care has been taken in the preparation of this publication, it may contain inadvertent errors for which we shall not be held responsible. The information given in this publication provides a bird's eye view on the recent important select developments and should not be relied solely for the purpose of economic or financial decision. Each such decision would call for specific reference of the relevant statutes and consultation of an expert. This document is a proprietary material created and compiled by C N K & Associates LLP. All rights reserved. This newsletter or any portion thereof may not be reproduced or sold in any manner whatsoever without the consent of the publisher.

This publication is not intended for advertisement and/or for solicitation of work.

[www.cnkindia.com](http://www.cnkindia.com)

**CNK**  
& ASSOCIATES LLP

### MUMBAI

3rd Floor, Mistry Bhavan, Dinshaw Vachha Road,  
Churchgate, Mumbai. 400 020, India.  
Tel: +91 22 6623 0600

501/502, Narain Chambers, M.G. Road,  
Vile Parle (East), Mumbai 400 057, India.  
Tel: +91 22 6250 7600

**Bengaluru:** +91 80 2535 1353

**Ahmedabad:** +91 79 2630 6530

**Pune:** +91 020 2998 0865

**Chennai:** +91 44 3500 3458

**GIFT City:** +91 79 2630 6530

**Dubai:** +971 4 3559533

**Vadodara:** +91 265 234 3483

**Delhi:** +91 11 2735 7350